82 - 1446

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor.

LIFETIME COMMUNITIES, INC.,
Petitioner,

v.

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where, during the pendency of a petition for rehearing before the Court of Appeals, Petitioner filed a motion in that Court asserting that a bill passed by the United States Congress limiting fees in bankruptcy cases, which was undisputedly dispositive of this case, had become law subsequent to the District Court order appealed from (because a purported "pocket veto" of the bill by the President was not effective), did the Court of Appeals err when it failed either (i) to determine whether the veto of the bill was effective, or (ii) to remand the case to the District Court with instructions to make such a determination?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The following reported opinions have been issued by courts below in connection with the payment of fees in this bankruptcy proceeding: (1) *In re Fidelity Mortgage Investors*, 16 B.R. 477 (S.D.N.Y. 1981); (2) *In re Fidelity Mortgage Investors*, 690 F.2d 35 (2d Cir. 1982).[1]

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[1] The opinion by Bankruptcy Judge Roy Babitt denying Lifetime's application for a reduction in fees was delivered orally. *In re Fidelity Mortgage Investors*, Arrangement No. 75 B 154 (unreported oral opinion, November 25, 1980).

JURISDICTION

The Judgment below was entered on August 23, 1982. A timely Petition for Rehearing with Suggestion for Rehearing In Banc was denied on December 1, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1976).[2]

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

Article I, Section 7, Clause 2

The text of this provision is set forth at A-28.

Original Savings Provision of the Bankruptcy Reform Act of 1978

> Sec. 403 (a) A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.
>
> * * * *
>
> (e) Notwithstanding subsection (a) of this section, a fee may not be charged under Section 40c (2) (b) of the Bankruptcy Act in a case in which the plan is confirmed after September 30, 1978, to the extent that such fee exceeds $100,000.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 403(a), (e), 92 Stat. 2549, 2683.

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[2] Pursuant to Supreme Court Rule 28.1, Petitioner Lifetime Communities, Inc. states that there are no parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates within the meaning of the Rule.

H.R. 4353 Amendment to Section 403

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 403(e) of the Act of November 6, 1978 (92 Stat. 2549; Public Law 95-598), is amended by inserting "or in which the final determination as to the amount of such fee is made after September 30, 1979, notwithstanding an earlier confirmation date," immediately after "September 30, 1978,".

H.R. 4353, 97th Cong., 1st Sess. (1981).

STATEMENT OF THE CASE

This case was commenced on January 30, 1975, when Fidelity Mortgage Investors ("FMI") filed a petition for an arrangement under Chapter XI of the now superseded Bankruptcy Act.[3] On January 4, 1978, Bankruptcy Judge Lesser entered an order (the "Confirmation Order") under Section 366 of the Bankruptcy Act, 11 U.S.C. § 766 (1976), confirming an Amended Chapter XI Plan (the "Plan"). (A-17) On February 28, 1978, as allowed by the Plan, FMI merged into Lifetime Communities, Inc. ("Lifetime" or "Petitioner"), with Lifetime acquiring all assets and liabilities of FMI including all debts, liabilities, obligations, and duties created by the Plan.

As a consequence of confirmation of the Plan, a schedule of additional fees adopted by the Judicial Conference of the United States at its March 16-17, 1970 meeting (the "1970 Schedule"), if applicable, would require Lifetime to make a payment, which was estimated at the time of confirmation to be approximately $1.7 million, to the Referees' Salary and Expense Fund (the "Fund").[4]

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[3] The basis for federal jurisdiction over this proceeding in the first instance was 11 U.S.C. §§ 701-799 (1970).

[4] *See* Bankruptcy Act, §§ 37b, 40c(2)(b), 11 U.S.C. §§ 65(b), 68(c)(2)(b) (1976). *See also* 1 *Collier Pamphlet Edition on the Bankruptcy Act and Rules* § 40, at 106 (1976).

In the Confirmation Order the Bankruptcy Judge noted that, while Lifetime had deposited with the Disbursing Agent appointed under the Plan an estimated amount to be paid to the Fund, that deposit was

> provisional only and the Disbursing Agent be, and he hereby is, directed to withhold any payment to the Fund pending further order or orders of the court fixing the precise amount payable to the Fund.

(A-19) No order fixing the precise amount payable to the Fund has yet been entered.

The Bankruptcy Act, under which this proceeding was instituted, was superseded by the enactment of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (the "Bankruptcy Reform Act") on November 6, 1978. One of the changes implemented by the Bankruptcy Reform Act was the elimination of the Fund with respect to bankruptcy cases commenced subsequent to October 1, 1979. Congress determined that the mechanism for financing the bankruptcy system effected by the Fund was burdensome and inequitable, and no longer appropriate.[5]

In addition, Congress provided in the Bankruptcy Reform Act that payments to the Fund should be limited in cases pending under the Bankruptcy Act on November 6, 1978. Specifically, Congress limited such payments to $100,000 where the plan in such a pending case was confirmed after September 30, 1978. Bankruptcy Reform Act, Pub. L. No. 95-598, § 403(e), 92 Stat. 2549, 2683 (quoted *supra* at 2). These provisions of the Bankruptcy Reform Act placed the FMI Chapter XI proceeding in an unusual posture. While debtors in new cases

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[5] *See In re Gulf Overseas Service Corp.*, 20 C.B.C. 1019, 1021 (W.D. La. 1979); Magistrates: Hearings on S. 2266, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess., Part II, 876 (1977); Report of the Judicial Conference Meeting of March, 1969, cited in S. Rep. No. 93-612 to accompany S. 1394, 92d Cong., 2d Sess. 2 (1972).

under the Bankruptcy Reform Act are not required to make any payment to the Fund, and while debtors in Chapter XI proceedings under the Bankruptcy Act whose plans were confirmed after September 30, 1978, do not have to pay more than $100,000 to the Fund, Petitioner would be required to pay approximately $1.7 million solely because its Plan was confirmed on January 4, 1978, despite the fact that no determination has yet been made of the payment due to the Fund.

To remedy this inadvertent gap in the legislation,[6] H.R. 4353, 97th Cong., 1st Sess. (1981) (quoted *supra* at 3) was introduced on July 31, 1981. 127 Cong. Rec. H5860 (daily ed. Aug. 1, 1981). H.R. 4353, discussed further below, limits the payment to the Fund to $100,000 in a case such as the instant proceeding where no determination of the amount of the payment was made as of September 30, 1978, notwithstanding earlier confirmation of the Plan.

Subsequent to the entry of the Confirmation Order (but prior to the introduction of H.R. 4353), Lifetime moved the Bankruptcy Court for an order reducing the amount of the payment to the Fund (then estimated to be approximately $1.7 million) which would be required of it by the 1970 Schedule. That motion, which was based upon considerations not relevant to this proceeding, was denied by order of Bankruptcy Judge Babitt on November 25, 1980, and the District Court, applying pre-H.R. 4353 law, affirmed Judge Babitt's order in an opinion filed on December 21, 1981. (A-12)

H.R. 4353 was approved by Congress on December 16, 1981, 127 Cong. Rec. H9809, S15645 (daily ed. Dec. 16, 1981), and both Houses adjourned for the inter-sessional recess of the 97th Congress later that day. 127 Cong. Rec. H9927, S15550 (daily ed. Dec. 16, 1981). On December 18, 1981, H.R. 4353 was signed by the Speaker

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[6] 127 Cong. Rec. H9808 (daily ed. Dec. 16, 1981).

pro tempore and presented to the President. 127 Cong. Rec. H9933-34 (daily ed. Dec. 18, 1981). *It is undisputed that H.R. 4353, unless effectively vetoed, limits the payment obligation of Lifetime to the Fund to $100,000.*[7]

On December 29, 1981, the President purported to veto H.R. 4353. 127 Cong. Rec. H9935 (daily ed. Jan. 6, 1982). Thereafter, on January 20, 1982, Lifetime filed a timely notice of appeal from the December 21 Judgment. At that time, the issue of whether H.R. 4353 became law was not raised before the Second Circuit.

The Second Circuit affirmed the Judgment on August 23, 1982 (A-1) and Lifetime promptly filed a Petition for Rehearing with Suggestion for Rehearing In Banc. On September 10, 1982, during the pendency of Lifetime's petition, attorneys for Lifetime became aware of information suggesting that the President had not accomplished an effective veto of H.R. 4353, but instead had attempted a constitutionally ineffective "pocket veto" of that bill. Upon confirmation of this information, Lifetime filed on September 20, 1982, a Motion for Leave to File Memorandum Supplementing Petition for Rehearing, and Motion for Stay of Decision and Mandate, for Reversal or for Remand (the "H.R. 4353 Motion"). This motion requested that the Court of Appeals, prior to issuing any decision or mandate, either (i) determine whether, as Lifetime contends, H.R. 4353 became law on December 30, 1981 because the President's attempted "pocket veto" was ineffective, or (ii) remand the case to the District Court for such a determination.

The Administrative Office of the United States Courts ("Respondent"), in replying to Lifetime's motion, agreed with Petitioner that the interests of justice required that

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[7] Appellee's Response to Appellant's Motion for Leave to File Memorandum Supplementing Petition for Rehearing (quoted *infra* at 7). *See also* Brief for Appellee on the merits in the Court of Appeals, at 30.

a determination should be made as to the effectiveness of the President's purported veto of H.R. 4353. The full text of their response is set forth below:

> Appellee, the Administrative Office of the United States Courts, does not oppose Appellant's motion to the extent to which it seeks leave to file a memorandum supplementing its petition for rehearing, and Appellee agrees that the case should be reheard by the panel on the issue of the validity of the President's veto of H.R. 4353.
>
> 1. Appellee's memorandum raises the issue of the validity of the President's "pocket veto" of H.R. 4353, *a bill which, had it been enacted, would have altered the law applicable to this case.* The government is confident that the President's veto of H.R. 4353 was well within his constitutional powers. However, this issue was not addressed by the panel. *In the interests of justice, the government believes that this case should be reheard by the panel on this issue alone,* and accordingly a briefing schedule should be established so that Appellant's claim may be fully aired.
>
> 2. In all other respects, the government opposes Appellant's motion.

(Emphasis added).[8]

The Court of Appeals, however, declined either to consider the effect of H.R. 4353 or to direct the District Court to do so. Instead, the Court of Appeals on October 21, 1982, denied Lifetime's motion, stating only that its mandate would issue promptly following determination of Lifetime's petition for rehearing "in order that appellant may make a timely application in the district court for Rule 60(b) relief, if appropriate." (A-10) *As demonstrated below, this ruling was erroneous.*

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[8] A footnote in the response setting out a suggested briefing schedule is omitted.

On December 1, 1982, the Court of Appeals denied the Petition for Rehearing with Suggestion for Rehearing In Banc (A-26), and its mandate issued on December 8, 1982. On December 17, 1982, Lifetime, pursuant to the only avenue left open by the Court of Appeals, filed with the District Court a Motion for Relief under Rule 60(b) of the Federal Rules of Civil Procedure. Lifetime intends to ask the District Court to hold its motion under Rule 60(b) in abeyance pending this Court's review of this Petition.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Unless H.R. 4353 was effectively vetoed, it is unquestionably dispositive of the matter which was before the Court of Appeals. While Lifetime's Petition for Rehearing was pending, Lifetime filed a motion requesting the Court of Appeals to determine the effectiveness of H.R. 4353 and apply it in the instant case, or in the alternative, to remand the case to the District Court for such a determination. In addition, Respondent in its response to that motion stated that "in the interests of justice" the Court of Appeals should make such a determination. The denial of that motion by the Court of Appeals, and its subsequent denial of the Petition for Rehearing, conflict with applicable decisions of this Court which have established that an appellate court must determine and apply the law as it exists when it makes its ruling, and not as it existed when the order appealed from was entered. The obligation of the Court of Appeals to apply the statutes of the United States to the case before it was not met by suggesting that Petitioner file a Rule 60(b) motion.

I. Petitioner Does Not Ask This Court To Determine Whether H.R. 4353 Was Effectively Vetoed.

The sole issue raised by this Petition is whether the Court of Appeals erred in failing either (i) to determine

whether H.R. 4353 became law, or (ii) to remand the case to the District Court to make such a determination.[9]

II. It Is Well Established That An Appellate Court Must Apply The Law As It Exists At The Time Of Its Ruling.

Numerous decisions of this Court have established beyond question "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974) (amended statute permitting award of attorney's fees applied to pending case). This principle has been held applicable *whenever* a case is *sub judice*, regardless of the procedural posture of the case. Thus, where a statute has been amended subsequent

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[9] Petitioner's position that H.R. 4353 became law (which was set forth in its H.R. 4353 Motion filed in the Court of Appeals) may be briefly summarized as follows: If the President desires to disapprove a bill, he is required to return the bill to the originating house within ten days (Sunday excepted) in order that Congress may have the opportunity of overriding the veto. United States Constitution, Article I, Section 7, Clause 2 (full text set forth at A-28). If the bill is not so returned, the bill becomes law at the expiration of the ten-day period, unless Congress by its adjournment has prevented the return of the bill. *Id.* Where the return is prevented, the inaction of the President results in the "pocket veto" of the bill. The President attempted a "pocket veto" of H.R. 4353, apparently because Congress was in an inter-session recess (between the First Session and the Second Session of the 97th Congress) at the time the ten-day period expired. It is Petitioner's position that this recess did not "prevent" the return of the bill, because the Clerk of the House of Representatives was authorized under House rules to receive messages from the President during the recess. *See Wright v. United States*, 302 U.S. 583 (1938); *Kennedy v. Sampson*, 364 F. Supp. 1075 (D.D.C. 19[illegible], *aff'd*, 511 F.2d 430 (D.C. Cir. 1974); *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976). *See also* Kennedy, *Congress, The President, and The Pocket Veto*, 63 Va. L. Rev. 355 (1977). Thus, the attempted pocket veto was ineffective. H.R. 4353 became law and, as such, is concededly dispositive of this case.

to the decision of the lower court, and the amended statute clearly applies to pending proceedings, the reviewing court must apply the amended statute. *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23 (1940) (bankruptcy amendment enacted after petition for writ of certiorari filed held applicable to pending proceeding).

The rule that changes in the law must be considered and followed by an appellate court has been held applicable even when the change did not take place until *after* a petition for rehearing had been denied. In *Huddleston v. Dwyer*, 322 U.S. 232 (1944), a new state court decision, issued after the Court of Appeals denied rehearing, was brought to the attention of the Court of Appeals in a second petition for rehearing, which was also denied. 322 U.S. at 235. Applying the general rule stated above, this Court vacated the judgment below and remanded to the Court of Appeals to reconsider its decision in light of the recent state court decision. 322 U.S. 237-38.

In view of the decision in *Huddleston v. Dwyer*, and the line of cases represented by that decision, it is clear that where, as in the present case, a potentially dispositive development in the law occurring after the District Court order appealed from is brought to the attention of the Court of Appeals *while a petition for rehearing is still pending*, the Court of Appeals must determine whether the new law controls the case (or remand to the District Court for such a determination).[10]

III. The Ruling Of The Court Of Appeals Below Conflicts With This Well-Established Rule.

It is undisputed that if H.R. 4353 became law, it would be dispositive of the matter before the Court of Appeals by limiting Lifetime's payment to the Fund to

[10] Indeed, this Court has held that the effect of a new statute must be considered even where counsel *failed* to bring the new law to the Court's attention. *Fusari v. Steinberg*, 419 U.S. 379, 387 & n.12 (1975).

$100,000.[11] Under the decisions of this Court, discussed above, when the Court of Appeals was presented, while a petition for rehearing was pending, with Lifetime's motion asserting that H.R. 4353 was in fact law, it should have either determined whether the President's veto of H.R. 4353 was effective, or remanded the case to the District Court to make such a determination.

Respondent has conceded that such a determination should have been made. In response to Petitioner's H.R. 4353 Motion, which raised the issue whether H.R. 4353 became law, Respondent stated to the Court of Appeals that the "interests of justice" required considering the merits of the issue raised as to the effectiveness of the President's purported veto of H.R. 4353.

Instead of considering whether H.R. 4353 had become law, however, the Court of Appeals denied Petitioner's motion in a two-paragraph order and suggested that Petitioner seek relief in the District Court under Rule 60(b) of the Federal Rules of Civil Procedure, citing *Standard Oil Co. v. United States*, 429 U.S. 17 (1976).[12] (A-10) The Court of Appeals subsequently denied the Petition for Rehearing with Suggestion for Rehearing In Banc. (A-26)

As suggested by the Second Circuit, Petitioner has filed a motion seeking relief under Rule 60(b) in the District Court. However, Petitioner should not be required to seek relief under Rule 60(b). Consideration of Peti-

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[11] Appellee's Response to Appellant's Motion for Leave to File Memorandum Supplementing Petition for Rehearing (quoted *supra* at 7). *See also* Brief for Appellee on the merits in the Court of Appeals, at 30.

[12] *Standard Oil Co. v. United States* merely held that a party need not file a motion for an appellate court to recall its mandate prior to seeking relief under Rule 60(b) in the District Court. 429 U.S. at 19. This opinion does *not* support the Court of Appeals' decision requiring that consideration of a potentially dispositive statute of the United States may occur only pursuant to a Rule 60(b) motion.

tioner's Rule 60(b) motion may involve a measure of uncertainty and extraneous factors having nothing to do with the question of whether H.R. 4353 controls this case. Rather, the decisions of this Court discussed above establish that a reviewing court *must* apply a recently enacted statute such as H.R. 4353 which is by its terms applicable to the pending proceeding.

Indeed, the Court of Appeals' limiting of the consideration of H.R. 4353 to a proceeding under Rule 60(b) conflicts with the Second Circuit's own prior decisions. In *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied sub nom. Addabbo v. Curtiss-Wright Corp.*, 400 U.S. 829 (1970), the Second Circuit revised its original opinion when a new state court decision was brought to its attention in an out-of-time motion not filed until after a petition for certiorari had been filed in this Court. In determining that the new state court opinion should be considered, the Second Circuit stated:

> For us to refuse to consider petitions for rehearing under the circumstances present here merely because a petition for certiorari has been filed would be, it seems to us, wasteful, for under the *Huddleston* procedure the Supreme Court would not reach the merits of the controversy, but would vacate our decision and order us to reconsider on the basis of the recent state opinion.

424 F.2d at 430.

It is easy to understand why in response to the H.R. 4353 Motion, Respondent represented to the Court that the "interests of justice" required the Court of Appeals to determine whether H.R. 4353 became law. If final judgment were to be entered in this case without considering the question of whether H.R. 4353 is law, the judgment would be in direct conflict with the applicable decisions of this Court as well as the applicable decisions of the Second Circuit.

CONCLUSION

The petition for writ of certiorari should be granted. Petitioner respectfully suggests further that the Judgment below be summarily vacated with instructions to the Court of Appeals either (i) to determine whether the veto of H.R. 4353 was effective, or (ii) to remand the case to the District Court to make such a determination.

Respectfully submitted,

/s/ Richard F. Levy

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CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of February, 1983, served three copies of the foregoing Petition on counsel for Respondent by causing such copies to be sent by first class mail, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ Richard F. Levy

RICHARD F. LEVY

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cal. No. 1230 August Term, 1981
(Argued May 21, 1982 Decided 8/23/82)

Docket No. 82-5005

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor,

LIFETIME COMMUNITIES, INC.,
v. *Appellant,*

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Appellee.

[Filed Aug. 23, 1982]

Before: TIMBERS, VAN GRAAFEILAND and KEARSE, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Duffy, J., which affirmed an order of the bankruptcy court, Babitt, J., denying appellant's application for a reduction in the amount of fees payable to the Referees' Salary and Expense Fund. Affirmed.

THEODORE L. FREEDMAN, Chicago, Ill. (James M. Lawniczak, Levy and Erens, Chicago, Ill.; Kenneth Singer, General Counsel, Lifetime Communities, Inc.; Eliot Lumbard, Lumbard and Phelan on the brief), *for Appellant.*

STUART M. BERNSTEIN, Assistant United States Attorney, New York, N.Y. (John S. Martin, Jr., U.S. Atty., S.D.N.Y., Richard N. Papper, Asst. U.S. Atty., New York City, on the brief), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge*:

Lifetime Communities, Inc., the successor by merger to the rights and obligations of Fidelity Mortgage Investors, a rehabilitated Chapter XI debtor, appeals from an order of the United States District Court for the Southern District of New York, Duffy, J., which affirmed an order of the bankruptcy court, Babitt, J. Judge Babitt's order had denied Lifetime's application for a reduction in fees totaling $1.65 million, which Lifetime is required to pay to the Referees' Salary and Expense Fund pursuant to section 40c(2)(b) of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *as amended by* Referees' Salary Act of 1946, ch. 512, 60 Stat. 323, 327 (repealed 1978). In seeking to avoid payment of this substantial amount, appellant argues that the promulgation of the fee schedule did not comply with the rulemaking provisions of the Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946), *recodified by* Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 381-88, 5 U.S.C. §§ 551-59, and that the fee was so unexpectedly large as to be inequitable. For the reasons hereafter discussed, we affirm.

Beginning with the short-lived Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803), and up to the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1330) district judges were assigned the task of appointing bankruptcy referees or their counterparts. The 1898 Bankruptcy Act as originally enacted provided that "[s]uch number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy." § 37, 30 Stat. at 555. However, nothing in the 1898 Act prescribed how the determination of necessity was to be made. This lack was remedied with the enactment of the Referees' Salary Act of 1946, ch. 512, 60 Stat. 323 (repealed 1978). That Act provided that the Director of the Administrative

Office of the United States Courts, after making appropriate local and national surveys of pertinent conditions, should recommend to the district judges, the various circuit councils and the Judicial Conference the number of referees to be approved and the territory which each should serve. *Id.* § 37b(1), 60 Stat. at 325. The district judges were directed to make recommendations thereafter to their respective circuit councils, which in turn would make recommendations to the Judicial Conference. *Id.* "[I]n the light of the recommendations of the Director and of the councils", the Conference was to determine the number of referees to be appointed and the territories they were to serve. *Id.*

The primary aim of the Referees' Salary Act, was the replacement of the then-existing fee system for compensating referees with a salary system. S. Rep. No. 959, 79th Cong., 2d Sess. 2, *reprinted in* 1946 U.S. Code Cong. Service 1231, 1232. The method prescribed for fixing referees' salaries was the same as that used in determining the need for referees. The Administrator reported to the district judges, the circuit councils, and the Judicial Conference. The district judges advised the councils, the councils made recommendations to the Judicial Conference and "in the light of the recommendations of the councils", the Conference determined the salaries. Referees' Salary Act § 37b(1), 60 Stat. at 325 & § 40c (2), 60 Stat. at 327.

In relieving referees of the responsibility of financing their individual offices, Congress did not abandon the concept of a self-supporting bankruptcy system. S. Rep. No. 959, *supra*, at 5-6, *reprinted in* 1946 U.S. Code Cong. Service at 1235-36; *United States v. Kras*, 409 U.S. 434, 448 (1973). Instead, Congress provided that there should be a filing fee, plus additional fees based in substance upon the size of the estate, *Mesa Farm Co. v. United States*, 475 F.2d 1004, 1007-08 (9th Cir. 1973). The additional fees were to be fixed in such a manner that the

total annual fees collected would approximate the total amount of the referees' annual salaries and expenditures. Referees' Salary Act § 40c(2), 60 Stat. at 327; *United States v. Nickerson & Nickerson, Inc.*, 530 F.2d 811, 814 n.5 (8th Cir. 1976). Congress provided that the same procedure should be followed in determining the schedule of additional fees as was followed in fixing referees' salaries. Referees' Salary Act § 376(1), 60 Stat. at 325. In order, however, that the total of salaries and fees would be kept in approximate balance, the Administrator was authorized to make limited revisions in the fee schedule once a year with the approval of the Conference. *Id.* § 40c(2), 60 Stat. at 327.

In thus empowering the Judicial Conference to set bankruptcy fees, Congress was following the precedent it had set with regard to Court of Appeals fees, Act of September 27, 1944, ch. 413, 58 Stat. 743 (codified as amended at 28 U.S.C. § 1913) and district court fees, Act of September 27, 1944, ch. 414, § 8, 53 Stat. 743, 744 (codified as amended at 28 U.S.C. § 1914(b)). Moreover, enactment of the Referees' Salary Act on June 27, 1946 followed by only sixteen days the enactment of the original Administrative Procedure Act, which took place on June 11, 1946. In view of the lockstep manner in which these two statutes came into being, Congress must have been acutely aware of the rulemaking provisions of the Administrative Procedure Act when it passed the Referees' Salary Act. By providing in the latter Act that the Judicial Conference should determine the schedules of graduated additional fees in asset, management and wage-earning cases "in the light of the recommendations of the Director and of the councils," Congress made clear its intent that the rulemaking provisions of the Administrative Procedure Act were not applicable to the Judicial Conference. *See Gullung v. Humble Oil & Refining Co.*, 210 F. Supp. 292, 293 (E.D. La. 1962).

A ready explanation for this may be found in the legislative history of the Administrative Procedure Act. *See Administrative Procedure Act, Legislative History 79th Cong., 1944-46*, S. Doc. No. 248, 79th Cong., 2d Sess. (1946) [hereinafter cited as *Legislative History*]. The Senate Judiciary Committee Print of June 1945, *reprinted in Legislative History, supra*, at 11-44, contains explanations of various provisions in the Act, including section 2(a) which defines "agency". The Committee stated that the term "agency" is defined substantially as in the Federal Reports Act of 1942, ch. 811, 56 Stat. 1079, and the Federal Register Act, ch. 417, 49 Stat. 500 (1935). *Legislative History, supra*, at 12.

Section 7(a) of the Federal Reports Act, 56 Stat. at 1079-80 (current version at 44 U.S.C. § 3502), defines "Federal agency" as "any executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration in the executive branch of the Government . . . ."

Section 4 of the Federal Register Act, 49 Stat. at 501 (current version at 44 U.S.C. § 1501), defines "agency" as "any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government . . . ."

The Senate Judiciary Committee's Report on the Administrative Procedure Act, S. Rep. No. 752, 79th Cong., 1st Sess. 10 (1945), *reprinted in Legislative History, supra*, at 185, 196, states that the word "agency" is defined in the Act "by excluding legislative, judicial, and territorial authorities." *Id.* at 196.

If legislative history has any significance at all, it is clear that Congress intended the entire judicial branch of the Government to be excluded from the provisions of

the Administrative Procedure Act. *Wacker v. Bisson*, 348 F.2d 602, 608 n.18 (5th Cir. 1965).

It is little wonder, then, that the Judicial Conference, with its membership of judges only, has never followed the rulemaking provisions of the Administrative Procedure Act in determining fees. Neither is it surprising that nobody heretofore has challenged the Conference's well-established and well-known practice. Disgruntled debtors and creditors have not been reluctant to attack fee schedules on other grounds. *See, e.g., United States v. Kras, supra*, 409 U.S. 434; *Mesa Farm Co. v. United States, supra*, 475 F.2d 1004; *American Guaranty Corp. v. Burton*, 380 F.2d 789 (1st Cir. 1967); *American Guaranty Corp. v. United States*, 401 F.2d 1004 (Ct. Cl. 1968). In view of the Conference's long-established practice, we deem it significant that, in section 1930 of the 1978 Bankruptcy Act, 28 U.S.C. § 1930, Congress reinvested the Conference with the power to set fees in Chapter XI cases without mandating any changes in the Conference's method of procedure.

The word "court" like any other word, "may vary greatly in color and content according to the circumstances and the time in which it is used." *See Towne v. Eisner*, 245 U.S. 418, 425 (1918). The term is often employed in statutes otherwise than in its strict technical sense. *Black's Law Dictionary* 425 (rev. 4th ed. 1968). We believe that when, as here, the Judicial Conference is acting in effect as an auxiliary of the courts, it falls within the definition of "court" as that term is used in the Administrative Procedure Act. *See Warth v. Department of Justice*, 595 F.2d 521, 523 (9th Cir. 1979); *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974); *Cook v. Willingham*, 400 F.2d 885, 885-86 (10th Cir. 1968) (per curiam).

One need only examine the annual reports of the Conference to appreciate how integrated its functions are with those of the courts. According to the *1981 Reports*

of the Proceedings of the Judicial Conference of the United States, the Conference during that year considered, among other things, the transcript rates of court reporters, the closing of court facilities, the places for holding court, the allotment of court space, the disposition of court records, the assignment of court reporters, the assignment and salaries of magistrates, miscellaneous fee schedules, and judicial ethics.

Although the Conference was performing an administrative function when it set the bankruptcy fees now being challenged, this is not dispositive of the issue before us. When a judge sets fees, he, too, is performing an administrative function. *In re India Wharf Brewery, Inc.*, 96 F.2d 710, 712 (2d Cir. 1938); *2A Collier on Bankruptcy*, ¶ 39.18, at 1491 (14th ed. 1980). The Conference is performing a task which otherwise might be left to the courts. *Ex parte Peterson*, 253 U.S. 300, 315 (1920). Dicta in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85 n.6, 86 n.7, 88 n.10 (1970), do not compel a contrary holding. In that case, the Court was considering whether it had original jurisdiction to issue a writ of mandamus or prohibition against an administrative order of the Judicial Council. It denied the petition on other grounds without deciding the jurisdictional issue. We have no problem with jurisdiction in the instant case. *See American Guaranty Corp. v. United States*, *supra*, 401 F.2d at 1009-11.

The definition of "agency" in 5 U.S.C. § 551 is identical with that in 5 U.S.C. § 701. The term "agency" also appears in 28 U.S.C. § 1391(e), which enlarges the venue of actions brought against an officer, employee, or agency of the United States. In *Liberation News Service v. Eastland*, 426 F.2d 1379 (2d Cir. 1970), this Court was called upon to consider whether section 1391(e) was applicable to ten members of the Senate Committee on the Judiciary. Judge Friendly, writing for the Court, looked to the definition of "agency" as contained in 5

U.S.C. § 701 and concluded that section 1391(e) applied only to the executive branch of the Government. 426 F.2d at 1384.

The applicability of section 1391(e) to the Judicial Conference was before the Court of Appeals for the Fifth Circuit in *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981). Plaintiffs in that action were challenging that portion of the Ethics in Government Act of 1978, 28 U.S.C. app. §§ 301-09 (Supp. 1982), which requires federal judges to file financial statements. Pursuant to the provisions of the Act, 28 U.S.C. app. § 303, the Judicial Conference established a Judicial Ethics Committee, whose duty it was in substance to prepare the necessary forms and to monitor compliance with the Act. The Court, citing *Liberation News Service v. Eastland*, *supra*, 426 F.2d 1379, affirmed the district court's dismissal of the complaint against the Judicial Ethics Committee and its chairman on the ground that the Committee was part of the judicial branch of the Government performing a judicial administrative function. 606 F.2d at 663-64. *See also Seltzer v. Foley*, 502 F. Supp. 600, 602 n.2 (S.D.N.Y. 1980).

We are satisfied from the foregoing review that the fees of which appellant complains were fixed lawfully and must be collected. Section 40c(2) of the Referees' Salary Act provides that "[a]dditional fees for the referees' salary and expense fund *shall* be charged in accordance with the schedule fixed by the conference." (emphasis supplied). The plain language of this section permits of no judicially created exception. *See Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises, Inc.*, —— U.S. ——, 102 S.Ct. 695, 696-97 (1982). The bankruptcy court's equity jurisdiction did not empower it to go beyond the prescribed limits of the Act. *In re United Merchants and Manufacturers, Inc.*, 597 F.2d 348, 349 (2d Cir. 1979); *Borgenicht v. Credi-*

tors' Committee, 479 F.2d 150, 153 (2d Cir. 1973); *Guerin v. Weil, Gotshal & Manges*, 205 F.2d 302, 304-05 (2d Cir. 1953); *In re FAS International, Inc.*, 382 F. Supp. 77, 79-81 (S.D.N.Y. 1974)), *aff'd. per curiam*, 511 F.2d 1164 (2d Cir.), *cert. denied*, 423 U.S. 839 (1975).

Section 403(e) of the 1978 Act, which limits the amount of fees to $100,000, applies only to those cases in which a plan is confirmed after September 30, 1978. The Act makes no changes in the mandatory contributions that must be made in cases like the instant one where confirmation took place prior to September 30. Bearing in mind that the fees prescribed in the Referees' Salary Act were intended to be applied towards payment of the bankruptcy court's general administration expenses rather than those of the charged estate, *Reconstruction Finance Corp. v. Cohen*, 179 F.2d 773, 776 (10th Cir. 1950), and that the debtor herein was fully aware of the purpose and contents of the fee schedule when it voluntarily sought Chapter XI relief, we conclude that the bankruptcy court did not err in holding the debtor to the precise terms of the schedule.

Finding appellant's remaining arguments to be without merit,[1] we affirm.

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[1] During 1981, the Judicial Conference denied requests from three debtors, including, we understand, the appellant herein, for reduction or cancellation of fees for the Referees' Salary and Expense Fund. *See Reports of the Proceedings of the Judicial Conference of the United States, supra*, at 35.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of October, One Thousand Nine Hundred and Eighty-two.

PRESENT:

HON. WILLIAM H. TIMBERS, *Circuit Judge*
HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*
HON. AMALYA L. KEARSE, *Circuit Judge*

82-5005

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor,

LIFETIME COMMUNITIES, INC.,
Appellant,

v.

THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Appellee.

[Filed Oct. 21, 1982]

ORDER

Appellant's motion, dated September 20, 1982, for a stay of mandate, reversal or remand of this Court's decisions in this matter is denied.

The mandate of the Court shall issue promptly following the determination of appellant's petition for en banc

consideration in order that appellant may make a timely application in the district court for Rule 60(b) relief, if appropriate. *See Standard Oil Co. v. United States*, 429 U.S. 17 (1976).

/s/ William H. Timbers
HON. WILLIAM H. TIMBERS

/s/ Ellsworth A. Van Graafeiland
HON. ELLSWORTH A. VAN GRAAFEILAND

/s/ Amalya L. Kearse
HON AMALYA L. KEARSE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 Civ. 0544 (KTD)

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor.

LIFETIME COMMUNITIES, INC.,
Appellant,

—against—

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Appellee.

[Filed Dec. 21, 1981]

MEMORANDUM & ORDER

Appearances:

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Assistant U.S. Attorney

KEVIN THOMAS DUFFY, D.J.:

Fidelity Mortgage Investors ["FMI"] filed a petition for an arrangement under Chapter XI of the Bankruptcy Act on January 30, 1975. Pursuant to the Confirmation Order entered on January 4, 1978, FMI was merged into a newly formed corporation called Lifetime Communities, Inc. ["Lifetime"], which assumed all of FMI's assets and liabilities. Under Section 40(c)(2) of the Bankruptcy Act, 11 U.S.C. § 68(c)(2) (1976), FMI was required to remit a fee into the referee's salary and expense fund based upon the amount to be paid to unsecured creditors under the plan of arrangement. In 1970, the United States Judicial Conference set the rate for such fees at 3 percent for the first $100,000 distributed and 1.5 percent of the balance, for all cases filed on and after July 1, 1970. The parties are in accord that under this schedule Lifetime's obligation to the fund is approximately $1.69 million.

Lifetime appeals from the Memorandum Endorsement and Order of Bankruptcy Judge Babitt, dated November 25, 1980, denying its application for a reduction or elimination of this fee. Essentially, Lifetime argues that the fee should be eliminated because the 1970 schedule was not promulgated by the Judicial Conference pursuant to the Administrative Procedures Act ["APA"], and because the levying of such a large fee is simply inequitable, especially in light of the subsequent change in the rule by Congress which limits such contributions to $100,000.

I.

The appellant's first argument is that the 1970 Schedule promulgated by the Judicial Conference is void and unenforceable because the Conference failed to comply with the notice and hearing requirements of the APA. Although the definition of an "agency" for the purposes of the APA expressly precludes the courts, 5 U.S.C. § 551, the appellant argues that the fee setting function of the

Judicial Conference is an administrative act and therefore subject to the APA.

This argument is not persuasive. While the cases cited by Lifetime liken the Judicial Conference to an administrative agency and characterize its functions as administrative, *e.g.*, *Chandler v. Judicial Council*, 398 U.S. 74 (1970), *Nolan v. Judicial Council of the Third Circuit*, 481 F.2d 41 (3d Cir.), *cert. denied*, 414 U.S. 880 (1973); *In re Mesa Farm Co.*, 475 F.2d 1004 (9th Cir. 1973), none of them hold that this arm of the courts is an agency subject to the APA. In *Warth v. Department of Justice*, 595 F.2d 521, 523 (9th Cir. 1979), the court held that, because the courts are not agencies under the APA, and the Freedom of Information Act incorporated therein, court records were not agency documents. Just as quasi-judicial proceedings by administrative agencies are not court proceedings and hence are subject to the APA, *see Wacker v. Bisson*, 348 F.2d 602, 608 (5th Cir. 1965), it follows that the quasi-administrative function of the courts are not necessarily agency functions subject to the APA. Furthermore, the Judicial Conference is made up exclusively of members of the judiciary. The APA excludes the entire judicial branch of the federal government. *Seltzer v. Foley*, 502 F. Supp. 600 (S.D. N.Y. 1980).

II.

The balance of the appellant's argument is premised on the assumption that a fee of $1.69 million pursuant to the dictates of fee schedule is *per se* inequitable. The fee structure was instituted pursuant to the expressed intent of Congress that the bankruptcy system under the old code be self-supporting and paid for by those who used it rather than by tax revenues from the public at large. *United States v. Kras*, 409 U.S. 434, 448 (1978). Consequently, the fee can be more rightly viewed as a user tax rather than a fee for services as argued by the appellant. In this light, an assessment of 1.5 percent of the assets

distributed to unsecured creditors is not *per se* inequitable.

Nor can it be said that the fee is inequitable as applied in this case. The fee schedule was known at the time the debtor sought the protection of the bankruptcy court. The fee itself had to be figured into the successful arrangement under which the debtor now operates. What the appellant really seeks is a windfall to those who have accepted its newly issued stock.

The order appealed from is in all respects affirmed.

SO ORDERED.

DATED: New York, New York
December 17, 1981

/s/ Kevin Thomas Duffy
KEVIN THOMAS DUFFY
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Arrangement No. 75 B 154

IN RE FIDELITY MORTGAGE INVESTORS,
Debtor.

[Dated January 4, 1978]

ORDER CONFIRMING DEBTOR'S PLAN

The Amended Chapter XI Plan (the "Plan") of Fidelity Mortgage Investors ("FMI"), the above-named debtor, dated November 8, 1977, having been transmitted to creditors; and

The deposit required by Chapter XI of the Bankruptcy Act and by the Plan, in the sum of $13,750,000, having been made to the order of William Helfer, as disbursing agent for FMI (the "Disbursing Agent"), in Citibank, N.A., 1 Citicorp Center, N.Y., N.Y., a designated depository; and

It having been determined after hearing on notice that:

A. The Plan has been duly accepted in writing by creditors whose acceptance is required by law; and

B. The Plan has been proposed and its acceptance procured in good faith, and not by any means, promises or acts forbidden by law, and the provisions of Chapter XI of the Bankruptcy Act have been complied with, and the Plan is for the best interests of creditors and is feasible; and

C. The debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; it is

ORDERED, ADJUDGED, DETERMINED AND DECREED that:

1. The Plan, a copy of which is annexed hereto as Exhibit "1", be, and the same hereby is, confirmed.

2. The monies deposited, as aforesaid, be disbursed in accordance with this order and the schedules of distribution filed with the court and incorporated herein by reference (the "Distribution Schedules") and pursuant to such further orders as the court may make, by check to be drawn and signed by the Disbursing Agent and countersigned by the undersigned Bankruptcy Judge, provided, however, that with respect to any creditor named in the Distribution Schedules and as to whose claim objections have been or will be made, as set forth in the Distribution Schedules ("Disputed Claims"), the Disbursing Agent shall hold the monies deposited for the payment of any such Disputed Claims, pending the entry of an order or orders disposing of the objection, and as to any Disputed Claim which has been proved and filed but neither allowed nor disallowed, but as to which no formal objection has yet been filed, FMI may, within one hundred fifty days (150) from the date hereof file with the court an objection to the allowance of such Disputed Claim, and shall bring the objection on for hearing on a date to be fixed by the court and shall serve a copy of the objection and notice of hearing upon the claimant not less than five (5) days prior to the date fixed for the hearing, and in the event of the failure of FMI to file the requisite objections within the period fixed herein, any objection to the allowance of the claims affected thereby shall be deemed waived and said claims shall be deemed allowed as if the same had not been listed as Disputed Claims.

3. The Disbursing Agent shall make the distribution by mailing the monies to the persons entitled thereto by first-class mail, or if represented by duly authorized attorneys at law, then to such attorneys, at their respective addresses as set forth in the Distribution Schedules.

4. The amount appearing as payable to the Referees' Salary and Expense Fund (the "Fund") in the Distribution Schedules is estimated and provisional only and the Disbursing Agent be, and he hereby is, directed to withhold any payment to the Fund pending further order or orders of the court fixing the precise amount payable to the Fund.

5. The Disbursing Agent be, and he hereby is, directed to withhold distribution of any monies to the persons whose claims are set forth in the Distribution Schedules as costs and expenses of administration, pending further orders of the court fixing the precise amount payable to each such person.

6. Concurrently herewith, the debtor has filed with the court a schedule of all creditors who have been listed on its schedules of liabilities, as amended, heretofore filed with the court as having claims which are undisputed, not contingent and liquidated as to amount, but who have not filed claims in this case. Said schedule sets forth the name and address, where known, of such creditors and the scheduled amount of such claims, for the purpose of enabling notice of confirmation to be given to such creditors, which notice shall advise them that (a) they may file a claim within thirty (30) days after the date of mailing of said notice, which claim shall not be allowed in an amount in excess of that set forth in the debtor's schedules as undisputed, not contingent and liquidated as to amount, and (b) the failure to file a claim within said time, shall be a bar to asserting any such claim against FMI. In the event such claims are filed the debtor may thereafter file and serve objections to the allowance thereof within one hundred fifty (150) days after the last date fixed for the filing of any such claims, and upon failure of the debtor to file objections within the time fixed herein the filed claims shall be allowed and deemed included in the appropriate schedules annexed hereto, and the Disbursing Agent shall make distribution of the monies to

which the claimants may be entitled in accordance with the terms of the Plan.

7. Upon determination that there is on deposit with the Disbursing Agent monies in excess of the amounts required to complete the disbursements pursuant to the Plan, such excess monies shall be paid to FMI by check drawn, signed and countersigned as aforesaid.

8. Notwithstanding anything to the contrary contained in this order or the Plan, the Disbursing Agent shall make no distribution of any monies to any of the persons listed on the schedules annexed hereto until the expiration of thirty (30) days from the date of this order.

9. Except as otherwise provided or permitted by the Plan or this order:

a. FMI is released from all of its dischargeable debts;

b. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of FMI with respect to any of the following:

i. Debts dischargeable under Section 17a and b of the Bankruptcy Act;

ii. Unless heretofore or hereafter determined by order of this court to be non-dischargeable, debts alleged to be excepted from discharge under clauses (2) and (4) of Section 17a of the Bankruptcy Act;

iii. Unless heretofore or hereafter determined by order of this court to be non-dischargeable, debts alleged to be excepted from discharge under clause (8) of Section 17a of the Bankruptcy Act except those debts upon which there was an action pending on January 30, 1975, the date

when the petition was filed initiating this Chapter XI case under the Bankruptcy Act, in which a right to jury trial existed and a party has either made a timely demand therefor or has submitted to this court a signed statement of intention to make such demand;

iv. Debts determined by this court to be discharged under Section 17c(3) of the Bankruptcy Act.

10. All creditors whose debts are discharged by this order and all creditors having claims of a type referred to in paragraph 9(b) above are enjoined, stayed and restrained from instituting or continuing any action or employing any process to collect such debts as liabilities or obligations of FMI.

11. The merger of FMI into Lifetime Communities, Inc. ("Lifetime"), a Delaware corporation, as described in the proxy statement of FMI dated November 15, 1977, a copy of which is annexed hereto as Exhibit "2", be, and it hereby is, authorized and approved.

12. Within ninety (90) days after the completition of all distributions required to be made by the Disbursing Agent pursuant to the Plan and this order, or within such further time as the court may allow, the Disbursing Agent shall stop payment on all checks then unpaid and shall deposit the total amount of the said unpaid checks with the Clerk of the Court by certified check, drawn, signed and countersigned as aforesaid, together with a list of the payees' names and addresses and the respective distributions to which each payee is entitled.

13. Within one hundred and twenty (120) days after the completion of all distributions required to be made by the Disbursing Agent pursuant to the Plan and this

order, or such further time as the court may allow, the Disbursing Agent shall file with the court a verified report showing compliance with this order, together with all cancelled vouchers and a bank statement showing the disbursements of all monies which were deposited as required by the provisions of Chapter XI of the Bankruptcy Act and the Plan in the Disbursing Agent's bank account.

14. The court shall retain jurisdiction of this Chapter XI case as provided in the Plan, and of all pending matters of whatsoever kind or nature, and to effectuate a compromise and settlement of the disputes between FMI and Citibank, N.A., as Indenture Trustee, as described in Article III(f)(4) of the Plan, and to determine all pending applications to reject executory contracts and the final allowance or disallowance of any claim arising therefrom. The court shall also retain jurisdiction to determine all applications for allowances of compensation or reimbursement of expenses as costs and expenses of administration of the Chapter XI case.

15. Any claims for damages arising from the rejection of executory contracts pursuant to applications under Chapter XI Rule 11-53 heretofore served and filed with the court shall be filed with the court no later than thirty (30) days from the entry of an order or orders rejecting such executory contracts. Any claims for damages arising from the rejection of executory contracts pursuant to the provisions of the Plan shall be filed with the court no later than thirty (30) days from the date of the notice of confirmation, which notice shall advise that such claims must be filed within thirty (30) days of the date thereof. Upon the failure of any party affected by the rejection of any executory contract to timely file a claim, he shall be forever barred from asserting any such claim against FMI. In the event such claims are filed, FMI may thereafter serve and file objections to the allowance thereof within one hundred twenty (120) days after the last date for the filing of said claims. Upon the failure of FMI to

file objections within the time fixed herein, the filed claims shall be allowed and deemed included in the Distribution Schedules and the Disbursing Agent shall make distribution of the monies to which the claimant may be entitled in accordance with the terms of the Plan.

Dated: New York, New York
January 4, 1978
at 2:30 o'clock p.m.

/s/ Stanley T. Lesser
Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of August one thousand nine hundred and eighty-two.

Present:

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. AMALYA L. KEARSE
Circuit Judges,

#82-5005

IN RE: FIDELITY MORTGAGE INVESTORS,
Debtor.

LIFETIME COMMUNITIES, INC.,
Appellant,

v.

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Appellee.

[Filed Aug. 23, 1982]

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

by /s/ Arthur Heller
ARTHUR HELLER
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the first day of December, one thousand nine hundred and eighty-two.

No. 82-5005

IN RE: FIDELITY MORTGAGE INVESTORS,
Debtor

LIFETIME COMMUNITIES, INC.
(Formerly known as Fidelity Mortgage Investors)
Appellant,

v.

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Appellee.

[Filed Dec. 1, 1982]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Lifetime Communities, Inc.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court

in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
Clerk

by /s/ Francis X. Gindhart
FRANCIS X. GINDHART
Chief Deputy Clerk

UNITED STATES CONSTITUTION

* * * *

Article I, Section 7, Clause 2

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

* * * *